No. 89-1048

In the Supreme Court of the United States

OCTOBER TERM, 1989

FMC CORPORATION, PETITIONER

v.

CYNTHIA ANN HOLLIDAY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN OPTOMETRIC ASSOCIATION IN SUPPORT OF RESPONDENT

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The American Optometric Association submits this brief amicus curiae in support of respondent. Letters granting consent, received from counsel for each of the parties, have been filed with the Clerk of this Court.

INTEREST OF AMERICAN OPTOMETRIC ASSOCIATION

The American Optometric Association ("AOA"), a non-profit membership organization incorporated under Ohio law, is a national professional association of more than 27,000 members consisting of licensed Doctors of Optometry, optometry students, and educators. AOA's objects, as set forth in its Constitution, "are to improve the vision care and health of the public and to promote the art and science of the profession of optometry." AOA has as affiliates the State optometric associations in each of the

50 States and in the District of Columbia, the Armed Forces Optometric Society and the American Optometric Student Association.

As the national professional organization representing the optometric profession, AOA has always been, and is now, vitally interested in matters which affect the adequacy of vision care available to the public. This includes, among other things, AOA's interest in supporting and sustaining what is usually called "freedom of choice" legislation, whether in connection with insured or self-funded health care plans. "Freedom of choice" is the universally enacted State legislation which, so far as it applies to the field of vision care, prevents insurance companies, health benefit plans and others from discriminating against the practice of optometry; it likewise prevents discrimination against patients who in obtaining vision care wish to utilize the professional services of optometrists instead of physicians for those services within the lawful scope of the practice of optometry.

The present case is one of a series that—depending on what this Court says about the scope of the ERISA preemption—may have a substantial impact on such matters on a national basis. When the Massachusetts ERISA litigation was before this Court, AOA filed a brief amicus curiae in support of the Commonwealth of Massachusetts, urging affirmance. The Massachusetts court had held that the "mandated benefit" provision (requiring reimbursement to be made for certain mental illness costs), which the Massachusetts statute made applicable to employee health benefit plans placed with insurance carriers, was not preempted by ERISA because such application of the mandated benefit statute was saved by the insurance savings clause in ERISA's preemption provision. This Court affirmed the judgment. *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724 (1985). AOA also urged that, no matter what decision this Court

might reach as to whether the Massachusetts mandated benefit statute was preempted, the Court should in any event avoid any intimation which might impair or cast a cloud on the continuing validity of the widely-adopted, but very different, State freedom of choice legislation. We submit that the Court's opinion in *Metropolitan Life* was responsive likewise to this concern.

The substance of AOA's position is this: While the broad preemption language in ERISA is to be interpreted generously, the preemption should not be given an overzealous overbreadth which would smother legitimate State legislation that Congress never would have intended to displace. In the present case the Third Circuit's judgment strikes a fair balance between the conflicting contentions of the parties concerning the antisubrogation provision of the Pennsylvania Motor Vehicle Financial Responsibility Law. By legislation generally applicable to actions arising out of the maintenance or use of a motor vehicle, Pennsylvania has provided that there shall be no right of subrogation with reference to a broad range of recoveries. The question here is whether ERISA's preemption provisions nullify this Pennsylvania statute with respect to certain medical expenses paid out by petitioner's health benefit plan for automobile accident injuries suffered by respondent. If such preemption occurs, then petitioner will recoup the money and respondent will be deprived of the antisubrogation protection which the Pennsylvania legislature has sought to confer generally on persons who are injured in automobile accidents. While AOA's interest in the narrower aspects of the issue as to this antisubrogation provision may seem in some respects peripheral, AOA's interest in this Court's disposition of the case is strong.

SUMMARY OF ARGUMENT

As the Third Circuit correctly viewed the case, the question of the valid applicability of the antisubrogation provision in the Pennsylvania Motor Vehicle Financial Responsibility Law called for the examination, if necessary, of three successive clauses in the preemption provisions in Section 514 of ERISA, 29 U.S.C. §1144—namely, the "preemption clause," the "insurance savings clause," and the "deemer clause."

The "preemption clause" itself starts off by preempting "all State laws insofar as they may now or hereafter relate to any employee benefit plan." Here the critical word is the word "relate." While it is broad, it is not to be given an unlimited or overbroad reading. The teachings of prior decisions, and particularly *Mackey* v. *Lanier Collection Agency & Serv.*, 486 U.S. 825 (1988), show that some reasonable limits must be placed on it, and that general State legislation which happens to have some impact on ERISA plans does not necessarily come within this preemption clause. The antisubrogation provision of the Pennsylvania Motor Vehicle Financial Responsibility Law is illustrative of the type of general State legislation which should not be caught by the net of the ERISA preemption clause's "relates." The Third Circuit too readily came to the contrary conclusion; its judgment should nevertheless be affirmed on the ground that the preemption clause does not apply as an initial matter. But in any event, and however this Court may now decide to treat this question, AOA urges that care be taken to avoid any intimation which might impair or cast an ERISA cloud on the validity of any of the widely-enacted State freedom of choice legislation.

However, if it be either decided or assumed for purposes of decision that the ERISA preemption clause does initially apply to the antisubrogation provision in the

Pennsylvania Motor Vehicle Financial Responsibility Law, then the next question is whether the antisubrogation provision is a law which "regulates insurance" within the meaning of ERISA's insurance savings clause. On this question there has been no controversy; the parties and amicus all agreed below that the antisubrogation provision is in fact a law which "regulates insurance" within the meaning of the savings clause. The Third Circuit correctly concluded that this is plainly so, and the conclusion is beyond reasonable challenge.

This brought the Third Circuit to a detailed analysis of the deemer clause. Its conclusion that certain limits must be placed on the deemer clause is supported by not only the structure of ERISA but by the extensive legislative history recounted in the Third Circuit's opinion. This led the Third Circuit to the view that self-insured plans must be considered under the deemer clause on a case-by-case basis to see whether the State regulation concerned "affects a central concern of ERISA" (885 F.2d at 89; Pet. A27). For the persuasive reasons specified by the Third Circuit—even if the Pennsylvania antisubrogation provision were held or assumed to be covered initially by the preemption clause—the deemer clause does not apply. Hence the Pennsylvania antisubrogation provision is not removed from the insurance savings clause and is not wiped out by ERISA preemption.

ARGUMENT

In seeking to find an accommodation of ERISA's rather complex, and by no means crystal-clear, preemption provisions, this Court and the lower federal courts sensibly have proceeded on a case-by-case basis. AOA's primary interest in this and comparable litigation is to assure that, when the issue finally comes squarely before this Court (if it ever does), all of the State freedom of choice laws

are sustained against any claim of ERISA preemption.[1] As ERISA preemption law develops in the meantime, no needless impediment should be placed in the way of this ultimately sound result.

At the outset it should be noted that the freedom of choice laws are totally unlike the mandated-benefit law which was before this Court in the Massachusetts litigation. The State freedom of choice laws do not require that a health plan shall cover any particular illness or condition. They do not force upon a plan the coverage for this or that illness or condition. For example, with respect to vision care, the freedom of choice laws do not require that a plan cover vision care at all; and if the persons responsible for formulating the plan do wish to cover particular aspects of vision care, the freedom of choice laws do not dictate which types of eye diseases or eye conditions or eye examinations shall be covered or with what frequency such coverage may be availed of by the employee.

Instead, the freedom of choice laws consist of a vast body of State enactments, on the books in one or more forms in all 50 of the States and in the District of Columbia, which safeguard a patient's freedom of choice to select a provider of a particular health care service. With

[1] When *Blue Cross Hospital Service, Inc.* v. *Frappier* was remanded by this Court, 472 U.S. 1014 (1985), for further consideration in light of *Metropolitan Life*, supra, the Missouri Supreme Court disposed of the case by holding that, in the light of *Metropolitan Life*, it is clear that State freedom of choice statutes applicable to insured plans (such as the Missouri statute) come within ERISA's insurance savings clause and hence are not preempted by ERISA. *Blue Cross Hospital Service, Inc.* v. *Frappier*, 698 S.W. 2d 326 (Mo. 1985). Accord, *Blue Cross and Blue Shield of Kansas City* v. *Bell*, 798 F.2d 1331 (10th Cir. 1986), holding that the Kansas freedom of choice statute applicable to insured plans comes within ERISA's insurance savings clause and hence has not been preempted by ERISA.

respect to vision care coverage—if and to the extent that such coverage is actually provided for by an employee benefit plan—this means that there was and is pervasive State legislation requiring that the plan reimburse the patient who prefers to use the professional services of an optometrist (instead of a physician), as long as the services come within what may lawfully be performed by a licensed optometrist under the laws of the particular State. Moreover, the freedom of choice laws do not inflict on the benefit plans any additional costs in the vision care field; and indeed, practical experience has indicated that, on the whole, the costs of services performed by optometrists tend to be less than the costs of comparable services performed by ophthalmologists.

Throughout the Nation these freedom of choice statutory provisions have been enacted to assure to the patient his or her right of choice and, so far as vision care is concerned, to prevent discrimination against using the professional services of optometrists. The freedom of choice statutes represent deep-rooted policies of the States concerned, in a field normally governed by State law. Moreover, since optometrists usually are more widely dispersed geographically, and more conveniently located, within a State than are ophthalmologists, such legislation helps to assure that patients, particularly the elderly, will have greater access to convenient prepaid health care.[2]

[2] In 1980, Congress expanded Medicare coverage to include services performed by optometrists in connection with the condition of aphakia. See 42 U.S.C. §1395x(r)(4), discussed in note 4 infra. In a 1976 Report recommending the adoption of this amendment, the Department of Health, Education and Welfare stated: "6. *Access to services*. Vision/eye care services for aphakic and cataract patients, as well as for patients more generally, can be made more accessible to the Medicare eligible population by providing reimbursement for services when provided by optometrists. In general, optometrists

Accordingly, it has been and remains AOA's position that:

(1) State freedom of choice laws are outside the scope of ERISA's "preemption clause" fairly interpreted—this turns on a fair but not over-extravagant reading of the phrase "all State laws insofar as they may now or hereafter relate to any employee benefit plan," in Section 514(a) of ERISA, 29 U.S.C. §1144(a); and

(2) in any event, proper recognition should be given to the scope of the "insurance savings clause" in Section 514(b) of ERISA, 29 U.S.C. §1144(b)—it is clear that insured benefit plans are plainly covered by the insurance savings clause under the doctrine of *Metropolitan Life*, supra; at least some of the freedom of choice laws are readily classifiable as a law "which regulates insurance" whether the particular benefit plan is insured or self-insured or a combination of the two; and

(3) in any event, the "deemer clause," Section 514(b)(2)(B) of ERISA, 29 U.S.C. §1144(b)(2)(B), should be properly interpreted, so as to confine its reach to its true purpose and scope—as the Third Circuit has done in this case.

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are more widely distributed geographically and practice in many smaller communities where other vision/eye care practitioners are not available." U.S. Department of Health, Education and Welfare, *Report to Congress: Reimbursement Under Part B of Medicare For Certain Services Provided by Optometrists*, as required by Title I, Section 109, of P.L. 94-182 (July 1976), p. v. Similarly, in connection with a 1986 Medicare amendment eliminating discrimination against optometry (also discussed in note 4 infra) the House Committee Report stated: "Many beneficiaries are either foregoing covered eye care or are paying out-of-pocket for eye care services furnished by optometrists because they do not have ready access to an ophthalmologist and because the present rules are too difficult to understand." H.Rept. 99-727, 99th Cong., 2d Sess., p. 81 (October 17, 1986).

I

No one can reasonably quarrel with the Third Circuit's observation in this case that "ERISA's section 514, 29 U.S.C. §1144, is hardly a model of legislative draftsmanship." 885 F.2d at 83; Pet. A11. But by now the starting point is this Court's analysis in *Metropolitan Life*, supra, to the effect that the Massachusetts mandated benefit law "relates to" ERISA plans, "and thus is covered by ERISA's broad pre-emption provision," 471 U.S. at 739—though, as it turned out, for the insured plans in issue there, the Massachusetts law was saved by the insurance savings clause.

The contention that the Pennsylvania antisubrogation provision does not "relate," in the ERISA sense, is a contention which was decided by the Third Circuit adversely to respondent (885 F.2d at 85; Pet. A15). Nevertheless, respondent here may rely on this contention as an independent ground in support of the judgment below. See, for example, *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 814 note 12 (1984); *Blum* v. *Bacon*, 457 U.S. 132, 137 note 5 (1982); *Granfinanciera, S.A.* v. *Nordberg*, 109 S.Ct. 2782, 2788 (1989).

About two years before *Metropolitan Life* was decided, *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983), had acknowledged that some State laws "may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan," 463 U.S. at 100 note 21, and cited as an example a decision holding that State garnishment of a spouse's pension income to enforce alimony and support orders is not preempted. Nothing in *Shaw* addressed the question whether freedom of choice laws came within the preemption clause; and the *Metropolitan Life* opinion was meticulous in leaving this matter for future consideration.

Freedom of choice laws raise the question of what is

the fair and reasonable interpretation of the word "relate" in ERISA's preemption clause. In our highly interdependent world, it can be argued that almost anything "relates" to almost anything else, and yet it must be clear that Congress could not have intended that the doctrine of preemption be carried to the utmost or even too far.

For example, it might be argued that a State law which imposes minimum safety standards for x-ray equipment used in a clinic examining and treating employees under a plan is a law which "relates" to an employee benefit plan; yet it is hard to believe that anyone would take seriously the claim that ERISA preempts such a State law. For another example, a State law which imposes certain minimum fire safety standards on a facility made available to employees under a benefit plan could, arguably, be said to be a law which "relates" to the plan; but, again, the contention that ERISA preempts such a law would defy common sense.

In other words, an appropriate place must be found for deciding where, under ERISA, the preemption line is to be drawn. As the Second Circuit stated in *Rebaldo* v. *Cuomo*, 749 F.2d 133, 138 (2nd Cir. 1984), certiorari denied, 472 U.S. 1008 (1985):

> "the preemptive scope of ERISA is neither all encompassing, *Lane* v. *Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984), nor unlimited, *Savings and Profit Sharing Fund of Sears Employees* v. *Gago*, 717 F.2d 1038, 1040 (7th Cir. 1983)."

and, again, in holding specifically that ERISA did not preempt New York's statutory limitation on hospital inpatient charges as applied to self-insured employee benefit plans (*id.*),

> "The containment of hospital costs is an exercise of a State's police powers, which should not be superseded by federal regulations unless that was the clear intent of Congress [citations omitted]. Accordingly, a State's promulgation of hospital rate schedules should not be found to 'relate' to 'the terms and conditions of employee benefit plans' unless this conclusion is unavoidable."

In important decisions subsequent to *Metropolitan Life*, this Court has made it clear that the question of where the line is to be drawn should turn on a fair consideration of the historical context, and of whether the Congressional purposes manifested in ERISA would be aided or subverted by interpreting the preemption provision to be applicable. *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1 (1987) (holding that a Maine statute mandating a one-time severance payment in the event of a plant closing did not "relate to any employee benefit plan"); and *Mackey* v. *Lanier Collection Agency & Serv.*, 486 U.S. 825 (1988).

Mackey decided that ERISA does not preempt Georgia's general garnishment law and hence does not prevent creditors of ERISA welfare benefit plan participants from bringing garnishment proceedings against the plan in order to collect judgments against plan participants. In reaching this conclusion this Court said (486 U.S. at 834)

> "state-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA; otherwise, there would be no way to enforce such a judgment won against an ERISA plan. If attachment of ERISA plan funds does not 'relate to' an ERISA plan in any of these circumstances, we do not see how respondent's proposed garnishment order would do so."

The Court carefully distinguished this general garnishment law from a special exemption the Georgia legislature had enacted which applied solely to ERISA employee benefit plans and which exempted them from

garnishment; that exemption statute the Court held was preempted by ERISA since it was specifically designed to affect employee benefit plans (486 U.S. at 829-830). In view of the distinction which the Court has thus drawn, it is important to note that the antisubrogation provision of the Pennsylvania Motor Vehicle Responsibility Law involved in the present litigation is not specially designed to apply to ERISA employee benefit plans, but is general legislation generally applicable.

Petitioner complains that the Pennsylvania antisubrogation law prohibits petitioner from exercising its subrogation rights (Pet. Br. 11). But the fact is that by virtue of this general Pennsylvania legislation, which is generally applicable to motor vehicle accident cases, petitioner does not have any such subrogation rights, and it is the strong public policy of Pennsylvania to prevent those in petitioner's position from evading the antisubrogation law by seeking to create such subrogation rights where none exist. It is no more appropriate for a self-insured benefit plan to seek to nullify such generally applicable Pennsylvania legislation than it would be for a self-insured benefit plan to seek to reinject a fault criterion into automobile accident cases in States which have enacted generally applicable no-fault laws. The reach of ERISA's preemption should not, and does not, stretch to such extremes.

Particularly in the light of the teachings of *Mackey*, it would appear that here the Third Circuit was too quick in rejecting the contention (which AOA supports) that the antisubrogation provision of the Pennsylvania Motor Vehicle Financial Responsibility Law does not "relate" in the ERISA sense, and that hence for this reason the ERISA preemption clause is inapplicable. But in any event, and however the Court may now decide to treat this question, we urge that care be taken to avoid any intimation which might impair or cast a cloud on the

validity of any of the widely-enacted State freedom of choice legislation.

It should be noted, moreover, that a considerable segment of the State freedom of choice legislation relating to vision care—some of it pertaining to insured plans only, some of it pertaining to plans not incorporated into insurance policies, and some of it pertaining to both—was enacted during the 1960s, long before ERISA was passed in 1974.[3] Hence the total absence, in ERISA's legislative history, of any suggestion that Congress intended to preempt this well-known mass of freedom of choice legislation adds much weight to the other reasons for concluding that no such preemption has occurred.

With respect to vision care, the freedom of choice laws are aimed at protecting people by assuring that more widespread vision care is available, by safeguarding the patient's freedom of choice, and indeed by discouraging monopolistic or restrictive practices—whether indulged in by insurance companies or by employers or by unions or by others. Such monopolistic practices would tend to channel away from optometrists, and in to physicians, the professional responsibility for and the revenue from the performance of vision care services which otherwise

[3] Such freedom of choice legislation relating to vision care dating from the 1960s is to be found in at least 24 States—namely, Alabama, Arizona, California, Colorado, Hawaii, Idaho, Indiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Washington, West Virginia—and from 1970 through 1973 in at least 10 additional States—namely, Arkansas, Florida, Kansas, Kentucky, Louisiana, Missouri, Nevada, New Mexico, New York, Virginia. (This is apart from the considerable body of freedom of choice legislation dating from those periods and relating to branches of health care other than vision care.) Accordingly, much of the freedom of choice legislation not only antedates the enactment of ERISA in 1974 (P.L. 93-406, September 2, 1974), but will be found well before 1970.

would flow to optometrists. Compare *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982).

This Court emphasized in *Fort Halifax*, supra, 482 U.S. at 11, that the Congressional purpose in adopting the preemption provision was to assist in achieving uniformity in the administration of an employee benefit plan having multi-state scope. In view of the fact that, with at most some minor variations, State freedom of choice legislation is universally present in the 50 States and the District of Columbia, no significant administrative diversity or complexity will be imposed by acknowledging that ERISA has not preempted any of the State freedom of choice statutes.

AOA's position—which AOA urges should be fully protected against dilution or impairment—was further confirmed within Congress during the enactment of the ERISA amendments known as the Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364, codified as 29 U.S.C. §§1001a et seq. During the final stages of that bill's passage in the House, Congressman Thompson (who was Chairman of the House Subcommittee on Labor-Management Relations and was piloting the bill through the House debates and was later one of the House Managers in the Conference Committee) stated (126 Cong. Rec. 23042, August 25, 1980):

> "Finally, the distinguished gentleman from Texas, Representative Frost, has asked me to clarify the effect of ERISA's preemption provision on a state law requiring that health insurance contracts written in that state must provide covered persons the option to choose the specialist of their choice or must provide that the services of a particular specialist must be covered by the insurance contract if that patient chooses to go to that specialist. It is clear that ERISA does not preempt such a law, which does not require that particular benefits be provided and therefore does not cause any cost-creating State law conflicts that preemption was intended to prevent. For example, a State law requiring that podiatrist, chiropractor, or optometrist services be covered by health insurance contracts if a person chooses to have a particular service performed by a podiatrist, chiropractor, or an optometrist, is not preempted."

While the views of a later Congress on such matters are not necessarily controlling, see *Mackey*, supra, 486 U.S. at 839-840, the foregoing statement from the pertinent Congressional leadership furnishes strong confirmatory support to AOA's position on this precise issue.[1]

[1] In the event that the question of preemption of State freedom of choice laws were to be directly litigated, there are at least two additional independent grounds supporting AOA's position that no such preemption exists.

First, preemption of the State freedom of choice laws would impair the federal antitrust laws and hence is expressly forbidden by ERISA itself in Section 514(d), 29 U.S.C. §1144(d), which provides that nothing in ERISA "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States" (with certain specified exceptions not relevant here). Various employee benefit plans, both insured and self-insured, contain discriminatory and restrictive provisions having highly anticompetitive effects injurious to the public interest, which create lively and realistic opportunities for group boycotts and other seriously discriminatory practices. Such provisions offend not only the public policy and statutes of many States, but also the federal antitrust laws. *Blue Shield of Virginia* v. *McCready*, supra; accord, *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), certiorari denied, 450 U.S. 916 (1981); *Wilk* v. *American Medical Ass'n*, 895 F.2d 352 (7th Cir. 1990); compare *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 457-465 (1986). The freedom of choice laws stand as a bulwark against those who would otherwise commit serious violations of the federal antitrust laws. If ERISA were to be interpreted as preempting the State freedom of choice

II

Even if the antisubrogation provision in the Pennsylvania Financial Responsibility Law were held to be—or were assumed to be—a law which "relates" in the ERISA sense, there would then be the questions which were next addressed by the Third Circuit. Is this law one which "regulates insurance" within the meaning of ERISA's insurance savings clause? On this there has been no con-

laws, it could hardly be doubted that there would be a serious impairment of the federal antitrust laws and of the policies which the federal antitrust laws espouse. Harmonious reading of ERISA as a whole should surely lead to the non-preemption result. Compare *Shaw*, supra, 463 U.S. at 102, holding that State fair employment laws are so important to the federal Title VII statute (of the Civil Rights Act of 1964) that such State laws are not preempted by ERISA.

Second, preemption of the State freedom of choice laws would also impair the 1986 federal Medicare law amendment relating to optometry, and hence for this additional reason is expressly forbidden by the same provision in Section 514(d), 29 U.S.C. §1144(d) of ERISA itself. Until the 1986 Medicare amendment, most services rendered by optometrists were not a subject for Medicare reimbursement, even though the services were authorized to be performed by an optometrist under applicable State law and even though such services when rendered by an ophthalmologist were reimburseable. However, Section 9336 of P.L. 99-509 amended Clause (4) of Section 1861(r) of the Social Security Act, 42 U.S.C. §1395x(r), to put the services furnished by optometrists on a totally equal footing, for Medicare reimbursement purposes, with those furnished by ophthalmologists, to the extent that the services fall within the lawful scope of the practice of optometry. This amendment firmly established a federal statutory policy of nondiscrimination and equal treatment with respect to services rendered by optometrists in the field of vision care. This federal statutory policy had been foreshadowed, with respect to the policy of nondiscrimination and freedom of choice, by two items of earlier legislation relating to federal employees (P.L. 93-363, adding what is now 5 U.S.C. §8902(k); and P.L. 93-916, amending 5 U.S.C. §8101(2) and (3)), which were enacted in 1974 by the same Congress which enacted ERISA.

troversy, and none should be generated in this Court. The Third Circuit noted that (885 F.2d at 85; Pet. A16)

> "Both parties and the amicus agree that the type of antisubrogation provision found in the Pennsylvania Financial Responsibility Law 'regulates insurance' within the meaning of the savings clause."

The Third Circuit correctly concluded that this is plainly so (885 F.2d at 85-86; Pet. A16).

III

Hence the Third Circuit moved on to the next question: Where the plan is self-insured, does the deemer clause take the antisubrogation provision of the Pennsylvania Motor Vehicle Financial Responsibility Law out from under the insurance savings clause and put it over into the preempted category? On this issue the Third Circuit's opinion (885 F.2d at 86-90; Pet. A18-A27) sets forth a remarkably clear and careful exposition of the relevant legislative history. Despite petitioner's unpersuasive effort to brush aside the details of the legislative history (Pet. Br. 26-27), the Third Circuit's recital is an accurate reflection of what really occurred during the preemption provision's journey through Congress. It reaches a conclusion which, we submit, comports with the structure and purposes of ERISA as well as its language. Specifically, the Third Circuit's analysis has led it to the conclusion that, with respect to self-insured plans, the proper meaning of the deemer clause is that the deemer clause is intended to cause preemption when the State regulation involved affects a central concern of ERISA but not when it does not affect a central concern of ERISA, and that since the Pennsylvania antisubrogation law is in the latter category the deemer clause does not apply and accordingly the Pennsylvania law is not preempted. To put the matter another way, the Third Circuit has

held that "the deemer clause guards against any insurance regulation that infringes on such ERISA areas as reporting, disclosure, and nonforfeitability" (885 F.2d at 88; Pet. A23), and that Pennsylvania's antisubrogation law does not involve any such infringement.

The fact that the Third Circuit's careful analysis led it to bypass (885 F.2d at 89; Pet. A24-A26) a dictum which appears in this Court's opinion in *Metropolitan Life*, supra, does not in any way detract from the correctness of the Third Circuit's analysis. If all dicta were binding, the law would be paralyzed beyond repair; this Court has often recognized the propriety—and indeed the necessity—of revisiting dicta when a point later becomes actually in issue. See, for example, *Cohens* v. *Virginia*, 6 Wheat. 264, 399-400 (1821); *Green* v. *United States*, 355 U.S. 184, 197 note 16 (1957); *McDaniel* v. *Sanchez*, 452 U.S. 130, 141 (1981); *United States* v. *Halper*, 109 S.Ct. 1892, 1903 note 11 (1989).

CONCLUSION

For the reasons we have summarized, the Third Circuit's judgment should be affirmed. In any event—and no matter how this Court decides to deal with the issues raised—the Court is urged to avoid any decision route which would impair or cast a cloud upon any of the State freedom of choice legislation which is so important to the Nation's welfare.

Respectfully submitted,

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